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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-437, 73-457, 73-464

MOBIL OIL CORPORATION,
PUBLIC SERVICE COMMISSION OF NEW YORK,
MUNICIPAL DISTRIBUTORS GROUP,
Petitioners,

v.

FEDERAL POWER COMMISSION

REPLY BRIEF FOR MUNICIPAL DISTRIBUTORS GROUP

The arguments advanced by the Commission in its brief bring clearly into focus the threshold issue in this case: Was the Commission legally justified in re-opening its final opinion and order in *Southern Louisiana I*, and retroactively revising its order requiring refunds of excessive rates collected during the 1954-1968 period, eliminating more than $226,000,000 of refunds and providing for a "work-off" of the remaining $150,000,000?

I.

The Lack Of Legal Power To Reopen The Southern Louisiana I Order.

The Commission's brief, as well as those of the intervenors Exxon Corporation and the California Company,[1]

[1] Exxon Br. p. 18; California Company Br. pp. 16-17. The brief for United Distribution Companies does not deal with this point at all.

relies exclusively upon the order of the Court of Appeals in Southern Louisiana I [2] as the sole authority for such an unprecedented procedure. The Commission's statement of questions presented makes clear that the issue is whether the Commission could reopen its proceedings upon being authorized to do so by the court of appeals. (Comm. Br., p. 2). The Commission itself had advised the Court in *Southern Louisiana I* that, on its own, "it would not have authority to order retroactive rate changes unless authorized to do so by the court at the time of affirmance." (Comm. Br., p. 20). The Commission recognizes that "the Commission exercised its authority *under the court's judgment* to reopen *Southern Louisiana I* and to modify the rates established in that case, including the rates for gas already delivered." (Comm. Br., p. 21, emphasis added).

In fact the Commission candidly concedes that it "has no power to change finally approved rates retroactively, and claims none." (Comm. Br. p. 24) There is abundant authority that the final orders of administrative agencies may not be later reopened, except perhaps to correct inadvertent ministerial errors. *American Trucking Association* v. *Frisco Transportation Co.*, 358 U.S. 133, 146; *United States* v. *Seatrain Lines*, 329 U.S. 424, 432-433; *International Union* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 340-341.

The action of the Commission, therefore, is lawful only if the Court of Appeals in *Southern Louisiana I* had judicial power to confer upon the Commission special authority to reopen its order. But the law is very clear that the Court of Appeals, upon affirming the *Southern Louisiana I* decision and order, had *no further power with reference thereto*, and could vest in the Commission no

[2] *In re Southern Louisiana Rate Cases; Austral Oil Co.* v. *Federal Power Comm.*, 428 F.2d 407, aff'd on rehearing 444 F.2d 125 (CA5, 1970), *cert. denied*, 400 U.S. 950.

powers in addition to those conferred by Congress. Once it had made the legal determination that the Commission's order was lawful—based upon findings resting upon substantial evidence and within its statutory powers—the Court's authority and jurisdiction were completely exhausted. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224.

The cases cited by the Commission and intervenors in support of the court's power [3] all are distinguishable on one vital point: in each of them, the agency under review had *committed legal error*, and the question was the extent of the court's power to *remedy that error*. Where an administrative agency has exceeded its powers, the rights of some party have been violated, and it is incumbent upon the courts to provide appropriate relief to the injured party. But where there has been no error on the part of the Commission, there is no place for a "remedy" or for "equitable relief." The duty of the reviewing court "is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. at 207. The court's "function is normally exhausted when [it has] determined that the Commission has respected procedural requirements, has made findings based on substantial evidence, and has applied the correct legal standards to its substantive declarations." *Williams* v.

[3] *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373; *Dolcin Corp.* v. *Federal Trade Commission*, 219 F.2d 742, 750-752 (CADC) (cert. denied 348 U.S. 981); *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223, 229; *Tennessee Valley Municipal Gas Association* v. *Federal Power Commission*, 470 F.2d 446, 452-453 (CADC).

In the *Dolcin* case, there was a remand for taking of additional evidence pursuant to § 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c).

Washington Metropolitan Area Transport Commission, 415 F.2d 922, 942 (CADC 1968) "Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, *the courts cannot intervene* in the absence of a clear showing that the limits of due process have been overstepped." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 565, 586 (1942); emphasis supplied.

In *Southern Louisiana I*, the Court of Appeals affirmed the Commission's decision and order *in toto*, after an exhaustive review of every finding in it. The court emphasized that its order was "an affirmance and not a remand." (444 F.2d at 126). When the court found that the Commission's order was adequately supported by the record, it was "without authority to set aside any rate adopted by the Commission which is within a zone of reasonableness." *Permian Area Rate Case*, 390 U.S. 747, 798. The Commission at that point was strongly defending the validity of its findings and orders in that case. When the court affirmed them, if it then had no power to set them aside, it certainly had no power to authorize the Commission to set them aside retroactively.[4]

The Commission explains the Court's action in *Southern Louisiana I* on the basis that it was "troubled" by the Commission's order, and believed "that the Commission should have complete flexibility to reopen and re-examine any part of its order, and it believed that a reversal or remand might interfere with the Commission's flexibility." (Comm. Br., p. 17). This statement evidences a miscon-

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[4] This, of course, is not to say that the Commission had no power to change rates *prospectively*, upon a finding of a change in circumstances. It recognized at the time that circumstances were changing rapidly, and it informed the court of measures it was taking to deal with the current situation. (428 F.2d at 421) But at that time the Commission saw no need to reverse its findings and orders in *Southern Louisiana I*, although it was of the opinion that, in the event of an affirmance it would be able to make only prospective adjustments. (Comm. Br., p. 20)

ception of the function and power of the court on petition for review. The inference is that the court's decision not to reverse or remand was an exercise of discretion, in an attempt to provide the most appropriate "remedy." But, in the face of the Commission's successful defense of its findings and order, the court, absent a finding of error, had *no power* to remand or reverse,[5] and no remedial power to invest the Commission with "flexibility" to change its orders because of changing policies. An administrative agency may not change "previous decisions because the wisdom of those decisions appear doubtful in the light of changing policies." *American Trucking Association* v. *Frisco Transportation Co.*, 358 U.S. 133, 146. That principle of law governs reviewing courts and may not be cast aside at their discretion.

The briefs of Exxon (p. 18) and the California Company (p. 15) go so far as to argue that there was "no unqualified affirmance by the Court of Appeals." This is a clear misapprehension of the record. The court expressed concern over the wisdom of the Commission's order, and doubt as to its efficacy to produce the desired economic results (428 F.2d at 439), but recognized that those questions were not even legally before the court (428 F.2d at 440). The court lacked the expertise to judge such matters, *FPC* v. *Colorado Gas Co.*, 348 U.S. 492, 501 (1955), and lacked the power to review the Commission's discretion regarding them. *FPC* v. *Natural Gas Pipeline*, 315 U.S. at 585. Therefore, the court's expressions of concern could not act as a qualification upon its judicial affirmance of the order, nor could they create in the court or the Commission extraordinary

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[5] The court of appeals recognized as much, stating that "in the light of *Permian*, we think that we are required to hold that the Commission's orders in this case are procedurally and substantively adequate under the law," 428 F.2d at 440, and that "We think *Permian* requires affirmance." *Id.*, at 441.

powers which the Commission would not otherwise have possessed.

The Exxon and California Company briefs[6] make an additional argument, not joined in by the Commission, that the Commission order in *Southern Louisiana I* never became "final", because the rates fixed therein did not become "effective", because they were stayed by the court of appeals, and then by the Commission after the affirmance. These intervenors cite no authority to the effect that the finality of an order is affected by issuance of a stay. The office of a stay order is to hold matters in abeyance pending a final appellate decision. Cf. Rule 62, FRCP; Rule 8, FRAP. The issuance of a stay order, therefore, cannot authorize the Commission, in December, 1970, to reopen and reconsider a final order issued in 1968 and subsequently affirmed on appeal in June of 1970.[7]

Since the Commission concedes that it had no legal authorization, other than the Court of Appeals' Order in *Southern Louisiana I*, for reopening its decision and order on refunds in that docket, and since the court of appeals had no power, upon affirming the Commission's order, to provide a "remedy" granting extraordinary powers to the Commission, it is clear that the Commission's retroactive order abolishing about $226,000,000 of refunds for the 1954-1968 period and providing for the "work-off" of the remaining $150,000,000 thereof, is, as a matter of law, unauthorized and unlawful.

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[6] Exxon Br., pp. 18-19; California Br., p. 16.

[7] Certiorari was denied by this Court on December 7, 1970. 400 U.S. 950.

II.

The Lack Of Any Factual Support For The Refund Order In This Case.

(a) *Issues Relating To Cost Elements.*

Although the Commission was without any legal power or authority to change, by its 1971 order, the refunds ordered by it in 1968, this portion of petitioner's reply brief answers the Commission's and intervenor's arguments that the refund order was factually supported, and shows that, even if the Commission had legal power to make the retroactive change in refunds, it lacked any factual support whatsoever for its action.

The Commission's brief does not take issue with petitioner's statement of the crucial defect in the Commission's fact findings which underlie its determination to eliminate most of the refunds and modify the remainder of them. The refund changes were sought to be justified by increasing the *Southern Louisiana I* findings as to flowing gas costs. Those costs were held to have been erroneous because two elements of the costs were "inadequate"—rate of return, and exploration and development (dry-hole) costs allocated to gas. (2 A 653)

The Commission would brush aside petitioner's arguments on this issue as relating only to "details of the refund plan." (Comm. Br., p. 47). But these findings by the Commission are not just details; they are basic to its decision to change its *Southern Louisiana I* refund order.[8] Had the Commission not found its earlier cost findings inadequate, there would have been no cost justification for revising the refunds.

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[8] The Commission said: "*In the light of these inadequacies* we find that the rates of 20.625 cents and 21.25 cents as a base for refunds during the designated periods are reasonable and in the public interest." 2A 654 (Emphasis supplied).

The crucial defect in the Commission's analysis is its total failure to review the *Southern Louisiana I* record before tossing aside as inadequate those two critical cost items.

It considered only the rate of return *as related to the evidence in Southern Louisiana II*, and it applied a new, "direct assignment," cost allocation method to the cost figures *in that case*. But, the use of another method in the second case is *no evidence* of error or inadequacy in the earlier docket.[9]

As to rate of return, the Commission argues that it found the zone of reasonableness to be 13% to 16% (Comm. Br., p. 47). But that, as the Commission says (Comm. Br., p. 47), was "in the light of additional evidence of the industry situation and public needs" on the record of the second, 1971 opinion, which reflected the economic conditions then existing. It is *no evidence* that the 1968 opinion, which fixed refunds for the 1954-1968 period, was wrong as to the economic conditions of the earlier period.

The Commission argues (Comm. Br. p. 48) that in any event, the "result reached" as to flowing gas costs is "within the zone of reasonableness," and so the infirmities of the method do not matter. That is a bootstrap argument. The "zone of reasonableness" found by the Commission is itself the product of the infirmities of the method. The Commission has not shown that the "zone of reasonableness" for the *Southern Louisiana I* rates extended to more than 21 cents. It has shown no factual error in its *Southern Louisiana I* rates.

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[9] The Commission Brief (p. 40) seems to imply that petitioner is questioning the Commission's right to change allocation methods. Ordinarily, of course, the Commission may make such changes on a prospective basis. Petitioner has questioned the validity of the "direct assignment" method in this case because (in addition to the reasons above discussed) it has been rejected by the Commission in every other producer proceeding. (MDG with Brief, pp. 29-31).

(b) *The Argument Of The Producers "Need" For Capital.*

In its defense of the modification of refunds, the Commission's brief repeatedly refers to the "need for internally generated capital to facilitate exploratory activity" (p. 43), and its scheme to "stimulate and facilitate capital investment in exploration and development" (p. 43), and the "public interest" in "permitting producers to retain capital for exploration and development" (p. 46), and the determination that the refund obligations of *Southern Louisiana I* "would unduly diminish producers' 'available capital'" (p. 38).

This argument fails on several grounds. First, there is no semblance of a Commission finding that the producers would be unable to embark upon an adequate exploration program or would be seriously hindered from doing so, if they were required to refund their excess rate collections.

Second, the Commission did not find that refunds would "unduly" diminish producers' capital. (2 A 629)

Third, there is no quantification anywhere in the record of the producers' "need" for capital, nor of the amounts which would be provided by the various non-cost elements of the rates (in addition to the refund forgiveness) to meet that need, nor of the practical results of providing—in addition to all cost elements—further capital for exploration. In fact, the Commission several times admitted its inability to determine the extent to which its increased prices and incentives would increase exploration and development. (2 A 618, 623, 628). But "if the Commission contemplates increasing rates for the purpose of encouraging exploration and development . . . it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose." *City of Detroit* v. *Federal Power Comm.*, 230 F.2d 810, 817 (CADC

1955). The Commission's finding herein totally fails that test.

The capital attraction test is, in any event, only half the picture. In *City of Chicago* v. *Federal Power Comm.*, 458 F.2d 731, 751 (CADC 1971, *cert. denied* 92 S.Ct. 1495), the court said:

> "While rather concrete factors such as the ability to maintain and attract capital are available to gauge whether a rate is just and reasonable to a producer, no factors apart from producer costs are available to guide efforts to make that determination from the standpoint of the consumer." [10]

It follows that the Commission cannot overcome the deficiencies in its cost findings by general statements about the capital needs of the producers, or the "public interest" in providing more capital to them.

Finally, the "need for capital" argument founders upon the total lack of any assurance that the additional capital provided to producers will be spent for gas, and especially for gas in the interstate market. The cited comment of the opinion that the Commission found "it unlikely that producers, already involved in the Southern Louisiana area, will decide not to expand their exploratory and drilling effort" (Comm. Br., p. 43) hardly rises to the dignity of a finding, and, in any event, offers no assurance that the gas found by such effort *will be dedicated to the interstate market.* If the producers in fact intend to use the refunds and other non-cost additives to their capital primarily for exploration and development for the interstate market in Southern Louisiana, it would have been easy to include an agreement to that

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[10] The court noted that this did not rule out non-cost factors as an *ingredient* of a rate structure, but that they must be considered within a framework of costs, and "it is this framework which normally gives the terms 'just and reasonable' some meaning from the standpoint of the consumer." 458 F.2d at 751, fn. 86.

effect in the settlement proposal. Such a provision is conspicuous by its absence.

III.

The Commission Does Not Have Discretion To Waive Refunds.

The Commission (Br. p. 40) and the California Company (Br. p. 17) argue that the Commission has the authority to waive refunds and that the arguments to the contrary made by MDG (main brief 42-44) were rejected in the *Hugoton-Anadarko Area Rate Case*, 466 F.2d 974 (9th Cir. 1972). To properly assess *Hugoton-Anadarko* it is necessary to distinguish between refunds which may be ordered in Section 7 proceedings and those which must be ordered in Section 4 proceedings. Under Section 7 the test is not one of justness and reasonableness but of public convenience and necessity. *Public Service Commission of New York* v. *FPC*, 329 F.2d 242 (CADC 1964). Accordingly, rates found excessive in Section 7 proceedings are not made unlawful by the Act. However, in examining rates under Section 4, the Commission must determine whether the rates are just and reasonable, and rates found to exceed those which are just and reasonable are unlawful. The latter are subject to mandatory refunds; the former are not.

Although there are cases which imply that refunds are always a matter of Commission discretion, this Court has repeatedly stated that under Section 4 excessive charges must be refunded. These cases have all been decided with regard to the intent of the Act.

The overriding intent of Congress in passing the Act was to give "full protective coverage to the consumer as to price." *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959). The Act provides the consumer price protection by empowering

the Commission to place price conditions on certificates of convenience and necessity under Section 7, to review rates in effect under Section 5, and by requiring that excessive rates charged after a period of suspension under Section 4 be refunded.

The courts have recognized that refunds are necessary to assure the complete consumer protection required by the Act. *Tenneco Oil Company* v. *Federal Power Commission*, 442 F.2d 982 (CA 5, 1970). This Court recognized that such protection was mandated by Congress under Section 4(e) of the Act in *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223 (1960), where it was said (382 U.S. 230):

> "We have said elsewhere that it is the duty of the Commission, 'where refunds are found due, to direct their payment at the earliest possible moment consistent with due process'."

Mr. Justice Clark speaking for this Court provided a keen analysis of Section 4 of the Act in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145. He wrote (371 U.S. 152-53):

> "In addition, an analysis of the policy of the Act clearly indicates that a natural gas company initiating an increase in rates under § 4(d) assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being 'just and reasonable.' In addition, the company can never recoup the income lost when the five month suspension power of the Commission is exercised under § 4(e). The company is also required to refund any sums thereafter collected should it not sustain its burden of proving the reasonableness of an increased rate, ... The Company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action

> including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."

Similarly in *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, it was said (350 U.S. 347):

> "Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments."

The importance of refunds in affording "consumers a complete, permanent and effective bond of protection from excessive rates and charges," *Atlantic Refining Co.* v. *Public Service Commission of New York, supra*, has resulted in a steady expansion of the Commission's power to order refunds. For example, it was held in *Callery*, that refunds could be ordered even in a Section 5 proceeding where an original order which never became final was overturned by a reviewing court. Moreover, the courts have found in the Act authority to support a Commission order requiring producers to refund amounts collected under a temporary Section 7 certificate which were in excess of the "in-line" rates approved for permanent certificates. Such refunds could be ordered even though the temporary certificate did not make the charges subject to refund. As was stated in *Tenneco Oil Company* v. *Federal Power Commission*, 442 F.2d 489, at 492 (CA 5, 1970):

> "It is now well settled that the Commission may and should require refunds from the producer if the price exacted from the purchaser by the producer under a temporary certificate is gretater than the in-line price for the area eventually established by the Commission. This is true even when, as here, the temporary certificate does not contain an express refund condition."

Although the implied power to order refunds in a Section 7 proceeding has been held to be discretionary, the Federal Power Commission has said that it not only has the power but the duty to order refunds. *Turnbull & Zoch Drilling Co., et al.* Opinion No. 499, 36 FPC 164 (1966). In light of the expansive view of the Commission's refund powers taken by both the Commission and the courts, it would be anamolous to now hold that the Commission may act to weaken the "complete, permanent and effective bond of protection" provided the consumer by manadtory refunds or to take action to weaken that protection.

It is true that a recent decision of the Ninth Circuit (Re *Hugoton-Anadarko Area Rate Cases*, 466 F.2d 974 (1972)) held that the Commission has discretionary power to refrain from ordering refunds of excessive charges in Section 4 proceedings. That decision is not only at odds with this Court's decision referred to above, but, additionally, the Ninth Circuit relied upon Section 7 cases and thereby failed to distinguish between refunds under Section 7, which require no determination of just and reasonable rates, and refunds under Section 4 where rates in excess of just and reasonable rates are interdicted as unlawful. Retention of refunds would do violence to this declaration for the natural gas company would thereby have been permitted to charge unlawful rates.

In the *Hugoton-Anadarko Case, supra*, the Ninth Circuit relied on four cases for the proposition that the Commission's refund power under Section 4(e) was discretionary (fn. 31, p. 991). Three of the cases dealt with the implied power to order refunds under Section 7 and did not present the question of the Commission's powers under Section 4(e). *Mesa Petroleum Co.* v. *Federal Power Commission*, 441 F.2d 182 (CA 5, 1971); *Continental Oil Company* v. *FPC*, 378 F.2d 510 (CA 5, 1967); *Public Service Commission of New York* v. *FPC*, 329 F.

2d 242 (CADC, 1964). The fourth case relied upon dealt with licensing under the Federal Power Act and therefore is no authority for the proposition cited that refunds are not mandatory under Section 4(e). *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (CADC, 1967). Moreover, in only one of the cases cited was the court directly faced with the issue of whether the refunds should be mandatory. In *Mesa*, *Continental* and *Niagara*, *supra*, the issue decided was whether the Commission had any power to order refunds, not whether refunds were mandatory.

In this case the court below relied on *Hugoton-Anadarko* and the cases cited therein for the proposition that refunds under Section 4 are discretionary. The decision is subject to the same infirmities as *Hugoton-Anadarko*, which cannot be considered good authority for the proposition that refunds under Section 4 are not mandatory.

United Distributors Group (UDG) relies on *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), for the proposition that the Commission's duty to order refunds is discretionary, not mandatory (brief, 49). The issue before this Court in *Permian* was the methodology to be used by the Commission in calculating the amount of refunds to be ordered. No issue was raised regarding the Commission's duty to order refunds; rather, the parties were concerned only with the amount of the refunds.

UDG argues (Br. p. 49) that the word "may" as used in Section 4(e) of the Act is intended to confer discretion on the Commission to order refunds. But UDG fails to analyze the sentence of the statute which provides for refunds.

Section 4(e) of the Natural Gas Act in pertinent part, states:

> If the proceeding has not been concluded and an order made at the expiration of the suspension peri-

> od, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, *to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified.* (emphasis supplied)

UDG apparently imports into the last phrase of the above-quoted provisions of Section 4(e) the "Commission may" and reads it as saying—

> the *Commission may* order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. (emphasis supplied)

But, it is obvious that this reading will not stand scrutiny.

The pertinent sentence breaks out:

> Where increased rates or charges are thus made effective, the Commission may, by order, require the natural gas company
>
> to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission,
>
> to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid,
>
> and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified.

Had Congress intended the order of refunds to be discretionary, it could have done so by eliminating the words "to order such natural gas company" from the last phrase. Had that been done, the sentence would have been grammatically clear. The insertion of these words must have been for a purpose because their presence alters the grammatical construction of the sentence. Moreover, Congress would not have inserted words without intending that they be given some meaning. The only purpose for which these words could have been used, was to separate the permissive portion of the statute from the mandatory portion, i.e., requiring the refund of increased rates or charges found not justified.

Section 4(e) so read makes perfect sense. That reading comports with the intent of Congress to provide "consumers a complete, permanent and effective bond of protection from excessive rates and charges" (*Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378 (1959)).

With respect to the matter of bond, which requires substantial premiums to be paid to bonding companies, the cost of which is charged against the consumers, it makes sense to permit the Commission to waive a bond where the Commission is satisfied that the financial viability of the natural gas company is such as to provide assurance that the refunds will be made. Indeed, although the Commission at one time required the posting of a bond under Section 4(e) (*El Paso Natural Gas Company*, 18 FPC 838 (1957)), the Commission later concluded to accept a natural-gas company's undertaking to make refunds in lieu of bond and has followed that practice to this day.

It is not in keeping with the statutory scheme to make the award of refunds a matter of discretion. The purpose of the Act is to protect the consumer from unjust and

unreasonable charges and to protect them completely against such charges. Section 4(a), therefore, declared excessive rates to be unlawful and Section 4(e) provides for the refund of such unlawful charges. The purpose of the Act cannot be made effective unless natural-gas companies are required to refund any excessive rates which they have collected.

IV.

The Four Escalations In Flowing Gas Rates.

The Commission (Br. p. 57) totally misconceives MDG's basis for its challenge of the automatic half-cent increase, and three contingent half-cent future increases, in the rates for flowing gas. The challenge was not to the level of dedications required to trigger the increases. It was to the need for *any such increase*, and to the lack of any evidence or finding that it was likely to produce more gas than would have been found without the escalations. The Commission's vague generalizations about a "critical shortage of gas" and a "strong relationship between price and supply" and a "cash flow to meet needs for heightened exploration effort" (Comm. Br., p. 58) do not approach an answer to petitioner's objections. The briefs in opposition all avoid reference to the pungent comments on this subject by Judge Leventhal in the *Texas Gulf Coast Area Rate Proceeding*, 487 F.2d 1043, 1071-1074, where an almost identical provision was struck down. These have been mentioned in petitioner's initial brief and will not be repeated here.

The Commission cites the court of appeals' argument that the escalations will not *dissuade* new producer entrants from entering the Louisiana area, even though they do not participate in the benefits of rate increases (Comm. Br., p. 60). This argument misses the point altogether. The problem is, if the new-gas price of 26

cents (escalating to 27 cents) is "at the appropriate level which will elicit exploratory and developmental effort in Southern Louisiana," as the Commission held (2 A 642), then why do the producers need further incentives? The Commission now argues that it is "the total rate structure—including the flowing gas rates, the refund credit program, and the contingent escalation program"—which must be looked to for attraction of capital to exploration and development in Southern Louisiana. (Comm. Br., p. 34). But obviously it cannot have it both ways. If the 26 cent new-gas rate is enough, then there is clearly no need for more.[11] The point was well expressed in the *Texas Gulf Coast* case:

> "If, as must be assumed, prices have been set for new gas that fully reflect the costs of exploration, including failures and the cost of attracting money (rate of return) to the exploration enterprises, then it is difficult to discern the argument for an extra allowance on *existing* gas flows, in the interest of providing an incentive to explore for *new* gas." 487 F.2d at 1072 (emphasis by the court).

The point is more than just an exercise in abstract logic or semantics. It is closely related to the basic proposition stated by Judge Leventhal:

> It is obvious that future expenditures in any particular producer area depend on evaluations of future profits, not past or recent receipts from activities begun in the past, at least where, as here, the future operations will be governed by price conditions far more liberal than prevailed at the time current operations were planned and developed. 487 F.2d at 1073.

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[11] Despite the vigorous attack on the adequacy of the 26 cent new-gas rate by Mobil Oil Corp. in its initial brief, it is clearly based solidly upon the kind of cost findings which have consistently withstood judicial review. See *Permian*, 390 U.S. at 800-804; *Southern Louisiana I*, 428 F.2d at 432-434; *P.S.C.N.Y. vs. Fed. Power Comm.*, 487 F.2d at 1081-1084.

These serious objections cannot be answered in terms of half a loaf being better than none, or one producer's cake being iced and another's not, or a new entrant not being dissuaded by the escalation on flowing gas rates. (App. C to Pet., pp. 50-51).

V.

The United Distribution Companies Brief.

The brief of the United Distribution Companies (UDC) typifies the producer- oriented approach to the issues in this case which may be summarized as follows:

Everyone acknowledges a serious gas shortage;

This results from inadequate capital investment in the search for gas;

Which in turn indicates that the price of gas has been inadequate;

Therefore, any program which increases revenues to producers is justified, and the amounts and methods are merely an exercise of Commission discretion, of no interest to a reviewing court.

The UDC falls into the same logical trap as the Commission in its argument about the adequacy of the costs found and rates fixed in *Southern Louisiana I.* It points to the evidence in the second case, which resulted in higher cost findings, as proof that the costs found in the first case, several years earlier, must have been wrong. (UDC Br., pp. 23-26). This argument is especially difficult to follow, in view of UDC's insistence that costs are consistently rising. (Br., p. 39).

However, as pointed out in our initial brief, the real explanation for the apparent increase in cost of flowing gas between the two dockets is the switch in allocation methods in the second docket. There is no evidence (and

UDC cites none) to show that costs are appreciably increasing with respect to flowing gas, where the investment has already been expended and the only current and future costs are those incurred in flowing the gas from reservoirs to pipeline. The cost evidence to which UDC refers to support its assertion of increases which would justify the escalations in flowing gas rates (Br. p. 39) is related entirely to new-gas costs.

At one point, UDC claims that the MDG suggests that the Commission "cut off the traditional source of funds—internally generated capital," and that MDG advocates "lower prices." (UDC Br., pp. 30-31). In fact, MDG is not contesting the prospective increase in flowing gas rates of about 30%, nor that for new gas, of about 40%.

If the Court were to adopt the approach to rates which inheres in the UDC argument, there would be little reason to continue the existence of the Federal Power Commission, at least insofar as producers are concerned. Congress has not seen fit to repeal the Act as it applies to producers, and it is not in the province of the Commission or the Court to do so.

CONCLUSION

The briefs of the Commission and intervenors fail to demonstrate that either the order of the Commission, or the affirmance of the Court of Appeals, is justified in law or in fact, insofar as they deal with modification of refunds or escalation of flowing gas rates.

Respectfully submitted,

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